IN THE SUPREME COURT OF MISSOURI

SC85451

STATE OF MISSOURI, ex rel. THE DOE RUN RESOURCES CORPORATION, *et al*.,
Relators,

vs.

HON. MARGARET M. NEILL,
Presiding Judge, Twenty-Second Judicial Circuit, City of St. Louis,
Respondent.

On a Petition for Writ of Prohibition
or, in the Alternative, Petition for Writ of Mandamus

SUBSTITUTE REPLY BRIEF OF RELATORS

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Introduction

Plaintiffs joined Marvin Kaiser as a defendant solely to create City venue. (Relators' Substitute Brief ("Relators' Brief")) at 28-29). In the Substitute Brief they file here for Respondent ("Respondent's Brief"), Plaintiffs do not deny this. They state twice that they would have filed their initial petition in the City, with Mr. Kaiser as a defendant, if only they had known at the time that "he was present in the City" (Respondent's Brief at 29; see also p. 25, n. 14). This acknowledges the obvious. Mr. Kaiser is a defendant only because he lives in the City. Plaintiffs' motive is precisely that condemned in Malone: joining a party as a defendant solely to create venue. State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc 1994).

Respondent nonetheless argues, as she must, that Plaintiffs' claims against Mr. Kaiser pass muster under both prongs of the test for pretensive joinder. To meet the first prong -- whether the pleading states a claim against the resident defendant -- Respondent argues for an interpretation of the law of corporate officer liability that would eliminate the long-standing requirement that an officer know of and participate in a corporate tort before the officer can be held liable. Respondent improperly relies on materials outside the pleadings, and misreads the governing case law.

To meet the second prong, Respondent incorrectly argues that in determining whether Plaintiffs had a reasonable basis for suing Mr. Kaiser the Court should attribute to Doe Run's internal documents inferences that the documents themselves do not sustain. She argues further that the Court should disregard Relators' affidavits and ignore

information readily available to Plaintiffs before they sued: testimony by persons in a position to know the truth about Mr. Kaiser's role within Doe Run, including Mr. Kaiser himself, who could have been deposed in Doyle or in the preceding Dixon case, which together had been pending more than six years before Plaintiffs sued Mr. Kaiser.

The Third Amended Petition fails both prongs of the test for pretensive joinder. The preliminary writ of prohibition should be made permanent.

I. THE THIRD AMENDED PETITION FAILS THE FIRST PRONG.

A petition must contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Mo. Sup. Ct. R. 55.05 [emphasis supplied]. Statements of legal conclusions are not statements of fact and are to be disregarded. See Royster v. Baker, 365 S.W.2d 496, 500 (Mo. 1963). If the facts -- not the legal conclusions -- pleaded against the resident defendant fail to make out a claim for relief under the governing substantive law, or under a reasonable argument for extension or reversal of existing law, the petition fails the first prong of the test for pretensive joinder. See State ex rel. Malone, 889 S.W.2d at 824. The Third Amended Petition in this case fails that test.

A. Respondent Attempts to Weaken or Eliminate the Elements of Knowledge and Participation Required for an Officer to Be Liable for a Corporate Tort.

Respondent repeatedly acknowledges what Relators have argued. For an officer to be liable for the tort of a corporation, the officer must both know of and participate in the corporation's tortious conduct. (See Respondent's Brief at 36, "Corporate officers are liable for corporate acts when they have knowledge of and participate in corporate torts.")

In a number of ways, however, Respondent attempts to erode or eliminate the elements of knowledge and participation that must be established before an individual officer can be held liable.

Twice in her brief Respondent argues that the nature of the torts at issue here -- strict liability for conducting an ultrahazardous activity, nuisance, and trespass, in addition to negligence -- somehow eases Plaintiffs' burden in pleading and proving active participation by Mr. Kaiser in the torts alleged. (Respondent's Brief at 32, 45). Even if some of these torts are "strict liability" torts as to the person or entity that carries on the activity in question, like the owner/operator of a landfill that becomes a nuisance, Frank v. Envtl. Sanitation Mgmt, Inc., 687 S.W.2d 876 (Mo. banc 1985) or the person or entity who handles nuclear materials, Bennett v. Mallinckrodt, 698 S.W.2d 854, 868 (Mo.App. E.D. 1985), this does not eliminate the need to plead and prove facts establishing knowledge and participation when the activity is carried on by a corporation and the defendant sought to be charged is an officer of the corporation. Respondent in fact acknowledges as much: "If Kaiser knew of and participated in the creation of a private nuisance, he is personally liable for the corporations' wrongful act in so doing." (Respondent's Brief at 33). Respondent thus concedes that knowledge and participation must still be shown.

In a second attempt to erode the requirement that Plaintiffs plead facts showing knowledge and participation on the part of Mr. Kaiser in the alleged corporate torts, Respondent relies heavily on the fact that Plaintiffs used the words "knowledge and participation" in their pleadings. The conclusory language appearing in paragraph 34 of

the Third Amended Petition, that Mr. Kaiser had "actual or constructive knowledge of Doe Run's wrongful conduct and participated in it" appears twice in Respondent's Brief, each time with emphasis. (Respondent's Brief at 35, 39).

The use of these magic words alone is not enough to defeat a claim of pretensive joinder. Those words are legal conclusions, not ultimate facts. See Royster, 365 S.W.2d at 500 (conclusory allegations are to be disregarded); First Sec. Bank v. Fastwich, Inc., 612 S.W.2d 799, 806-807 (Mo.App. W.D. 1981) (allegation that a bank and an individual "conspired" is conclusory and fails to state a cause of action); Friedman v. Edward Bakewell, Inc., 654 S.W.2d 367, 369 (Mo.App. E.D. 1983) (allegation that "Defendants' acts as aforesaid were intentional and without justification or excuse" are conclusory and are disregarded); Cristmon v. Allstate Ins. Co., 57 F. Supp.2d 380, 381-82 (S.D. Miss. 1999) (plaintiff moves to remand removed case to state court on grounds of fraudulent joinder; federal court holds that the plaintiff's allegation that corporate officer "participated in the steering policy and practice of Allstate" is conclusory so that resident defendant was fraudulently joined).

If a bare allegation that an individual officer "knew of and participated" in a corporate tort were sufficient, any plaintiff could defeat any claim of pretensive joinder of a corporate officer by including in the petition the elements of the tort in general terms and then asserting that the individual defendant "knew of and participated" in the tort. As the cases cited above show, Missouri law does not permit such conclusory pleading.

Plaintiffs in this case recognized the inadequacy of the bare statement that Mr. Kaiser "knew of and participated in" a corporate tort. They first pleaded their tort

claims against him in exactly that way. In paragraph 32 of the Second Amended Petition after setting out their conspiracy allegations they stated, without further elaboration, "Defendant Kaiser had actual or constructive knowledge of and participated in, an actionable wrong of Defendants." ((Petition, Ex. 7, ¶32). In the Third Amended Petition, in contrast, Plaintiffs chose not to rest on bare allegations of knowledge and participation, but instead set out the "facts" that they now contend establish Mr. Kaiser's knowledge of and participation in corporate torts (Third Amended Petition, Ex. 8 ¶33, 34[1]). It is on the basis of those facts, rather than the pleadings' legal conclusions, that the sufficiency of Plaintiffs' pleading is to be judged.

B. Respondent's Attacks on the Court of Appeals' Opinion Are Unfounded.

Respondent accuses the Court of Appeals of relying too heavily on that Court's opinion in Lynch v. Blanke Baer & Bowey Krimko, 901 S.W.2d 147 (Mo.App. E.D. 1995) (Respondent's Brief at 40). Relators had argued in the Court of Appeals that Lynch -- a pretensive joinder case decided by the same court in which this writ application was pending, which like this case presented the question whether the plaintiff had adequately pleaded an officer's knowing participation in a corporate tort and concluded that he had not -- was controlling on the Court of Appeals here.

[1] Plaintiffs criticize Defendants for addressing paragraphs 33 and 34 at length (See Respondent's Brief at 32, erroneously referring to the paragraphs at issue as 34 and 35), but those are the only paragraphs in the Third Amended Petition attributing any acts or omissions to Mr. Kaiser.

In Lynch, as the Court of Appeals here pointed out, the individual defendant was the very corporate officer--the president--who had terminated the plaintiff's employment. The plaintiff had so pleaded, in paragraph 8 of the petition.[2] The Lynch court held that the individual defendant was nonetheless pretensively joined, because "[t]here are no allegations that Bryant individually participated in the wrongful discharge." 901 S.W.2d at 154. Rather, the plaintiff had pleaded that the president was acting for the corporation, and so was not participating for purposes of the rule that imposes liability on an individual officer who participates in a corporate tort.

The Court of Appeals here is hardly to be faulted for finding its own prior opinion to be controlling. However, the Court of Appeals did more than rely on Lynch. Citing Missouri authority including this Court's decision in Fusz v. Spaunhorst, 67 Mo. 256, 264 (Mo. banc 1878), the Court correctly stated the governing rule: that "[n]othing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability." Court of Appeals Opinion at 7. The Court then considered every prior decision that had been brought to its attention by Respondent, comparing the facts that had been held to constitute participation in torts in those cases to the facts that are alleged to constitute participation here. The Court of Appeals found the allegations here wanting.

As the Court of Appeals did, this Court should consider the facts that Plaintiffs plead and determine whether, under existing Missouri case law or a reasonable and good

[2] Lynch, 901 S.W.2d at 53.

faith basis for extension or reversal of that law, they state a claim against Mr. Kaiser. The correct answer to this question is the one that the Court of Appeals reached. Imposing liability on Mr. Kaiser based on the facts pleaded here would unreasonably extend individual liability for corporate torts far beyond the scope of such liability recognized in prior decisions. (See Relators' Brief at 31-37, analyzing the cases that Respondent cites and comparing them to the facts of the case at bar).[3]

C. Respondent Misreads Curlee and the Other Trespass Decisions.

Respondent continues to rely heavily on Curlee v. Donaldson, 233 S.W.2d 746 (St.L. App. 1950), (Respondent's Brief at 41-44) and other trespass decisions from the first half of the twentieth century. Those decisions establish that a defendant need not have been the actual trespasser to be liable for trespass. Curlee, 233 S.W.2d at 753. When the trespasser is an agent acting for a principal and within the scope of the agency, the principal is also liable. 233 S.W.2d at 752. Nowhere, however, do Plaintiffs plead that Mr. Kaiser was the principal of any agent who trespassed on Plaintiffs' property.

[3] Respondent cites one Missouri corporate officer case not addressed in Relators' Brief which was discussed by the Court of Appeals, Honigmann v. Hunter Group, Inc., 733 S.W.2d 799 (Mo.App. E.D. 1987). The officers there were alleged to have personally been involved in introducing competing buyers to a seller that was already being represented by the franchisee. This personal involvement was held to satisfy the participation test; the allegations of participation in Doyle do not reach that level.

Nor could they. If (which Doe Run denies) some agent of Doe Run is liable for a trespass on Plaintiffs' property, it is Doe Run who is the principal, not Mr. Kaiser.

The decisions also hold that an "aider and abettor" can be liable for a trespass without actually venturing on the plaintiff's land, and it is on this theory that Plaintiffs appear to rely. They characterize Mr. Kaiser as an aider and abettor of trespasses allegedly committed by others. They argue, first, that control is irrelevant to aiding and abetting liability. (Respondent's Brief at 43). Curlee does not support Respondent's argument. It was on the basis of his personal control of the trespassing woodcutters that the corporate president in Curlee was found to be an aider and abettor of the trespass:

> Our conclusion from the evidence in this case is that defendant James W. Donaldson is individually liable for the trespasses on the ground that he aided, abetted and encouraged their commission. It appears that he ordered and directed two crews of wood cutters and the necessary skidders and truckers to cut and haul timber from the Toedebusch tract. He was in complete charge and assumed the entire control of the timber operation . . . .

233 S.W.2d at 753 (emphasis supplied).

As Respondent admits (Respondent's Brief at 44), in Robinson v. Moark-Nemo Consol. Min. Co., 163 S.W. 885 (Mo.App. 1914), the other trespass decision involving corporate officers on which she principally relies,[4] the court likewise based its finding

[4] In her substitute brief, Respondent relies for the first time on another trespassing woodcutter case, Dyer v. Tyrell, 142 Mo.App. 467, 127 S.W. 114 (Mo.App. Spgfd.

that the officers contributed to the trespass on the fact that the officers involved were the managers, who had the authority to control the employees who committed the trespass.

Unlike in Curlee and Robinson, Plaintiffs here have neither pleaded nor attempted to prove that Mr. Kaiser had control over the operators of the smelter. The question then becomes this: under what circumstances can a corporate officer who neither directly participates in a trespass, nor has control over the trespassing employees or agents, be liable as an aider and abettor? As the discussion of the decisions addressing an individual's liability for corporate torts in Relators' Brief shows, no Missouri appellate decision has ever held an officer liable where he was not an active participant or in direct control of the tortfeasors. (See Relators' Brief at 35-38). Even under the most liberal formulation of aiding and abetting liability (e.g., "aids, abets, assists or advises," Curlee, 233 S.W.2d at 753) the individual must take some affirmative act to encourage or assist those who commit the trespass.

1910). Dyer did not involve a claim against a corporate officer. The individual whose liability was at issue had, in his individual capacity, signed the contract under which the trespassing woodcutters were operating. The defendant's credit made the operation possible because the seller of the timber would not sign the contract without the defendant's signature. The court held that this was sufficient to make out a prima facie case that the defendant was liable as an aider and abettor. There are no comparable facts here.

Plaintiffs plead no such facts here. The most they allege is that Mr. Kaiser failed to take steps to prevent the trespass, without pleading any facts showing that he had a duty or the authority within the corporation to do so. Plaintiffs' pleading does not sufficiently allege the "active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining" that has long been held a requisite to individual officer liability. Fusz v. Spaunhorst, 67 Mo. at 264.

Respondent recognizes that Plaintiffs must plead facts establishing a duty on the part of the corporate officer (Respondent's Brief at 51), but she confuses the duty of the corporation -- not to commit trespass, be negligent, or to create a nuisance or conditions giving rise to strict liability for ultrahazardous activities -- with the duties of individual corporate officers. An officer's duty is to refrain from knowing and active participation in corporate torts, and Plaintiffs plead no facts showing Mr. Kaiser breached that duty here.

D. Respondent Improperly Relies on Materials Outside the Pleadings in Addressing the First Prong of the Test for Pretensive Joinder.

Respondent's Brief improperly makes extensive reference to materials outside the pleadings in arguing the first prong of the test for pretensive joinder. In considering the first prong, the Court is to confine itself to the face of the petition. State ex rel. Malone, 889 S.W.2d 822, 824 (Mo. banc 1994). Respondent encourages the Court to consider, not the facts pleaded, but Plaintiffs' recent gatherings from a number of internet websites plus the Wall Street Journal. (Respondent's Brief at 46-48). None of these materials

(Respondent's Appendix, A-1 through A-11) was before Respondent when she denied Relators' venue motions.

Even these materials, presumably the best Respondent could find in an internet search, contain no suggestion that a CFO's responsibilities do include or should include environmental decision-making. They are irrelevant here. Either the pleadings are sufficient for pretensive joinder purposes or they are not, but these exhibits say nothing about Mr. Kaiser's responsibilities.

Respondent also states that in assessing even the first prong of the pretensive joinder test the Court should consider, not the facts Plaintiffs plead, but the facts they might have pleaded if only they had had a chance to conduct discovery. Respondent states, "Plaintiffs have been allowed no discovery to determine Kaiser's exact role." (Respondent's Brief at 46). This is not true. There was never a time, from the filing of the Dixon case in 1995, through the decision on Relators' venue motions in July 2002, that Plaintiffs' discovery rights were in any way restricted. There was never any stay of discovery in the trial court. Plaintiffs actually had extensive document discovery during that time (Doe Run's Reply, Ex. 16 at 11), but chose not to depose Mr. Kaiser or any other Doe Run employee.

Plaintiffs could have deposed Mr. Kaiser. They could have deposed anyone else with knowledge of his role in the corporation, at any time, even after they sued him and his affidavit was filed. They did not. They should not now be heard to assert that there are unpleaded facts, not yet discovered, which show Mr. Kaiser knew of and participated

in a corporate tort. Whether pretensive joinder has occurred must be determined now, not later. It cannot await the further discovery Plaintiffs could have taken long ago.

D. Respondent Mischaracterizes the Facts That Plaintiffs Plead.

Respondent first addresses the real issue here -- the sufficiency of the facts that Plaintiffs do plead -- at page 49 of her Substitute Brief. Even when she does so, she mischaracterizes the facts, attributing to the Third Amended Petition things it does not say. Most significantly, Respondent says the Third Amended Petition describes Mr. Kaiser as "the person with the ultimate budget-making and fiscal responsibility" (Respondent's Brief at 49), and charges him with failure to make sure that funds were spent the way Plaintiffs think they should have been spent. In fact, the Third Amended Petition nowhere identifies Mr. Kaiser as "the person with ultimate budget-making and fiscal responsibility." The most that is alleged is that he "had involvement in the budgeting process." (Third Amended Petition, ¶ 34). There is a significant difference between having involvement in the budgeting process and being the ultimate decision maker. As shown in Relators' argument of the Second Point Relied On, the documents produced to Plaintiffs rebut any inference that Mr. Kaiser is the ultimate decision maker about how money is spent at Doe Run, particularly on environmental expenditures, and Plaintiffs refrained from any such allegation in their pleading.

If, when a corporation commits a tort, everyone who has "involvement in the budgeting process" is a tortfeasor because the corporation did not spend the money necessary to avoid the tort, then the reach of individual liability for corporate torts is far wider than any court has ever held. Neither Plaintiffs nor Respondent has cited a single

decision from any jurisdiction in which mere "involvement in the budgeting process" was sufficient to make an officer a tortfeasor.

Similarly, Respondent states that Plaintiffs have pleaded that the expenditure of funds would have "placed his [Mr. Kaiser's] stock prices and/or stock options on Doe Run (and options of the other Defendants) in jeopardy" and "would have generated higher costs, lower profits, and affected the bonuses and other remuneration Kaiser received." (Respondent's Brief at 49-50). The Third Amended Petition, in the conspiracy paragraph (¶ 33), did contain a conclusory assertion that an objective of the "conspiracy" was to violate the environmental laws "because of the costs and reduction of profits, value, bonuses and the value of wages, stock and/or stock options of Doe Run as well as other Corporate Defendants." This allegation was not tied to Mr. Kaiser, nor in good faith could it have been. As paragraph 30 of the Third Amended Petition reflects (Ex. 8, ¶30), the shares of Doe Run are owned entirely by The Renco Group, Inc. Mr. Kaiser owns neither shares nor stock options, and Plaintiffs could not and did not plead that he did. Mr. Kaiser's compensation is not affected by the level of environmental expenditures, and Plaintiffs could not and did not plead that it was.

The only wrongs attributed to Mr. Kaiser in the Third Amended Petition are that he failed to do things: to see that sufficient funds were allocated for environmental controls, to warn the people of Herculaneum, or to purchase the right environmental

control technologies.[5] Yet Plaintiffs do not plead facts showing that any of these actions were within Mr. Kaiser's duties within the corporation, or that he (as opposed to the corporation or others within the corporation who did have responsibility for environmental compliance) had any duty to the third parties who are now suing Doe Run. Failure to act in the absence of a legal duty to act is no tort. That is the most Plaintiffs have alleged or can allege as to Mr. Kaiser.

E. Plaintiffs' Conspiracy Claim is Insufficient.

In denying Relators' venue motion, Respondent did not rely on Plaintiffs' pleaded conspiracy theory, correctly recognizing that, "An identity between agent and principal leads to a legal impossibility, because two entities that are not legally distinct cannot conspire with one another." (Order of July 16, 2002, Relators' App. at A-5). She characterized the conspiracy allegations as "conclusory." (Id.). However, in this Court, Respondent attempts to defend the sufficiency of the conspiracy claim. (Respondent's Brief at 56-59). Relators demonstrated that the "facts" pleaded here are mere conclusions and that there is no pleading of facts showing a meeting of the minds. Defendants also showed that there is no pleading of a conspiracy among independent economic actors, because an agent cannot conspire with the agent's principal, and the personal benefit alleged to have been received by Mr. Kaiser -- his compensation as a corporate officer --

[5] As shown in Relators' principal brief, Plaintiffs do allege that Mr. Kaiser took some actions, such as approving expenditures for environmental controls, but approving expenditures for environmental controls is not tortious.

is not the type of individual benefit necessary to sustain a conspiracy claim. (Relators' Brief at 44)[6]. This demonstration is not refuted in Respondent's Brief.

Respondent does argue that there are multiple actors here because there are numerous corporations and individuals allegedly involved. (Respondent's Brief at 59). This argument ignores the fact that each corporation was, at the time of its alleged participation in the "conspiracy," either a corporate parent or grandparent of Doe Run or a partner of Doe Run in operation of the smelter. Each individual defendant is or was an officer or agent of one of these entities at the time. In briefing before Respondent (Doe Run's Reply Memorandum, Ex. 16 to Petition in Prohibition, at 4-6), Doe Run laid out the relevant facts in detail and showed that all of the various entities and individuals whom Plaintiffs have sued are not separate actors for purposes of conspiracy law.

Because the Third Amended Petition fails to state a claim against Marvin Kaiser for participation in a corporate tort or for conspiracy, Relators have established that Mr. Kaiser was pretensively joined under the first prong of the test for pretensive joinder.

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[6] On the legal conclusion vs. ultimate fact distinction, Plaintiffs cite dicta from DeFino v. Civic Ctr, 718 S.W.2d 505 (Mo.App. E.D. 1986), that turns on the fact that it is an antitrust case, (*id.* at 510), and Einhaus v. Ames, 547 S.W.2d 821 (Mo.App. E.D. 1976), which determined how much specifity is needed in pleading that a hammer is defective. Id. at 825-26. Neither decision relieves a plaintiff from the obligation to plead facts, not conclusions.

II. THE THIRD AMENDED PETITION FAILS THE SECOND PRONG.

Before Respondent, Relators showed that the facts pleaded in the Third Amended Petition, to the extent they ascribe wrongdoing to Mr. Kaiser, are not true. They also showed that Plaintiffs had the means of knowing those facts were not true at the time they sued him. This is sufficient to establish pretensive joinder under the second prong. State ex rel. Coca Cola Bottling Co. of Mid-America v. Gaertner, 681 S.W.2d 445, 447 (Mo. banc 1984); State ex rel. Malone, 889 S.W.2d at 824.

A. The Kaiser and Zelms Affidavits May Be Used Both to Establish That Plaintiffs' Allegations are False and that Plaintiffs' Belief In Their Claims at the Time They Sued Mr. Kaiser Were Unreasonable.

That the facts pleaded against Mr. Kaiser are false is established by the Affidavits of Mr. Kaiser and Mr. Zelms, which show definitively that Mr. Kaiser did not conspire with anyone to violate the environmental laws, that he did not have involvement in "setting environmental goals for the smelter, and the pollution control budget that included the purchase of contaminated properties" and that he did not "participate in and approve budgets which delayed or rejected implementation of proper pollution control measures and remediation of properties in the Class Geographic Area defined below," as alleged in paragraph 34 of the Third Amended Petition. (See Kaiser Affidavit, Ex. 9, Tab J; Ex. 12).

Plaintiffs incorrectly assert that consideration of any affidavits on a pretensive joinder motion is improper. In fact, affidavits may be considered, and are often necessary to establish that the pleaded facts are false. State ex rel. Kyger v. Koehr, 831 S.W.2d 953, 955-56 (Mo.App. E.D. 1992). If the affidavits are uncontroverted, the facts in the

affidavits should be taken as true. See State ex rel. Ford Motor Co. v. Bacon, 63 S.W.3d 641, 644 (Mo. banc 2002)

Respondent also argues that, while a de novo standard of review applies in this writ setting, she made a "discretionary decision" not to rely on the affidavits, which is reviewable under an abuse of discretion standard. (Respondent's Brief at 61). Nothing in her July 16, 2002 Order evidences such an expression, nor does Respondent explain how it could ever be within the discretion of a court to refuse to consider competent evidence of the falsity of the pleaded facts in a pretensive joinder case.

Respondent contends that the affidavits here are insufficient to establish pretensive joinder, because: (a) the affidavits are controverted by the documents Respondent cites so that they do not conclusively prove the falsity of the pleaded facts (she calls this "first part" of Malone's "second test"), and (b) the affidavits were furnished only after suit was filed, and so are not relevant to the reasonableness of Plaintiffs' belief in their claim at the time they sued Mr. Kaiser (Respondent calls this the "second part" of the second Malone test). (Respondent's Brief at 61). In fact, the affidavits are relevant to both "parts" of the second prong: the falsity of the facts pleaded and the lack of a reasonable basis for belief in their truth at the time suit was filed.

Respondent compares this case to Bottger v. Cheek, 815 S.W.2d 76 (Mo.App. E.D. 1991). (Respondent's Brief at 62). In Bottger, before filing suit plaintiff's counsel had been told that the treating physician had called Barnes Hospital to advise that plaintiff was coming and needed immediate treatment. Id. at 79. The hospital had delayed treatment, and plaintiff sued the hospital on that basis. Id. During the lawsuit, the physician's records

were produced and showed that he had not called the hospital about the plaintiff. Id. at 78. This defeated the delayed treatment claim, and the plaintiff dismissed the hospital. Id. at 79. The Court of Appeals held that there had been no pretensive joinder, because plaintiff had a reasonable basis for belief in the claim at the time the suit was filed even though later-discovered facts showed the plaintiff had been mistaken. Id. at 80-81.

This case is different. In Bottger, plaintiff's counsel had information supporting a claim against Barnes at the time suit was filed and no opportunity for discovery to test that information before he filed suit. In this case, Plaintiffs had no information that would actually support a claim against Mr. Kaiser at the time suit was filed (see Relators' Brief at 47-60) and had had every opportunity to test their theories by deposing persons with knowledge. Plaintiffs did not use that opportunity, but instead chose to sue Mr. Kaiser on the basis of information that they now contend was incomplete.

Respondent also cites State ex rel. Hoeft v. Koehr, 825 S.W.2d 65 (Mo.App. 1992), but that case supports Relators' position, not Respondents'. There, joinder of Union Electric Company was held pretensive because at the time of filing suit the plaintiff lacked any information supporting an essential element of his claim against Union Electric. Id. at 67. Here, at the time of suit Plaintiffs lacked information to support their claim of knowing participation by Mr. Kaiser in corporate torts. The result should be the same; the joinder should be held pretensive.

Bottger and Hoeft hold, consistent with decisions of this Court, that Plaintiffs' belief in their case is to be measured is an objective standard. Bottger, 815 S.W.2d at 80; Hoeft, 825 S.W. 2d at 66. The reasonableness of Plaintiffs' belief is to be measured by

"the information available at the time the petition was filed," State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 527 (Mo. banc 1994), Hoeft, 825 S.E.2d at 66.[7] "Information available" includes not only the facts plaintiffs actually knew, but information available to them by means they chose not to use. What Marvin Kaiser and Jeff Zelms knew about Mr. Kaiser's role in the company was information readily available to Plaintiffs -- through discovery in their long-pending lawsuits -- before they sued Mr. Kaiser. Thus, the Kaiser and Zelms affidavits, as well as the documents that Plaintiffs actually relied on, may be considered in assessing both the truth of Plantiffs' averments and the reasonableness of Plaintiffs' belief in those averments at the time they sued Mr. Kaiser.

B. Plaintiffs' Defense of Their "Reasonable Belief" is Without Merit.

Relators have shown that the few documents that Plaintiffs cite that refer to Mr. Kaiser do not reasonably support the inferences that Plaintiffs draw from them. (Relators' Brief at 49-59). Respondent attempts a point-by-point refutation. (Respondent's Brief at 64-75). If, as this Court's decisions hold, the reasonableness of Plaintiffs' position is to be measured on an objective basis, the Court should not accept either party's reading of the documents without carefully examining them.

[7] Plaintiffs quotes a passage from Hoeft, suggesting it holds that joinder is not pretensive if plaintiffs can point to "a specific fact" to support their claim. In fact, Hoeft does not so hold, as is evident from reading the phrase "a specific fact" in its context. 825 S.W. 2d at 67.

Respondent concedes that Plaintiffs' Exhibits 1 through 10 (Ex. 15 Exs. 1-10) contain generally known information about the company and about Herculaneum. (Respondent's Brief at 65). Those documents do not tend to establish that Mr. Kaiser knew of tortious conduct giving rise to those conditions, or that he participated in such conduct. Regardless of any relevance they might have to Plaintiffs' claims against Doe Run – the merits of which are not at issue on the present motion – they add nothing to the claim against Mr. Kaiser.

On the budget issues, Respondent states that at the time they sued Mr. Kaiser Plaintiffs believed he had "complete oversight over the budgeting process." (Respondent's Brief at 66). This is different from their pleading, which asserts merely that he had "involvement in the budgeting process."

Plaintiffs also pleaded that the process in which Mr. Kaiser was involved included "setting environmental goals for the smelter, and the pollution control budget that included the purchase of contaminated properties." (Third Amended Petition, 34). Respondent does not identify for the Court any document establishing that Mr. Kaiser's participation in the budget process included setting environmental controls or pollution control budgets for the smelter, for there are no such documents. As Mr. Kaiser stated in his Affidavit, he had no such involvement. (Ex. 9, ¶ 2).

Respondent does not contest Relators' demonstration (Relators' Brief at 51) that every single Authorization for Expenditure ("AFE") form that Plaintiffs cited showed Mr. Kaiser's approval, rather than his disapproval, of the expenditure involved. She argues that a few of the approval forms nonetheless show that expenditures were made

too late or involved unacceptable tradeoffs of one environmental expenditure against another. Respondent's interpretation of the documents is not reasonable.

Two of the AFE forms relate to the design, construction and installation of a new ventilation system for the dross furnace process baghouse, which cost $115,000 just to design (Ex. 15, Ptff. Ex. 22) and $2,871,000 to purchase and install (Ptff. Ex. 15, Ex. 23).[8] Respondent contends that the documents can reasonably be read to say that the entire $3 million project -- designing, costing, purchasing and installing -- was originally planned to take only four months (from approval in November 1994 to completion in March 1995), but was improperly delayed. (Respondent's Brief at 67, 71).

The March 1995 "estimated" completion date was contained on an AFE that related only to "Phase I" of the project, the design and cost estimating phase, which one could reasonably expect would be completed in four months. (Ex. 15, Ptffs. Ex. 22)(See Kaiser Supplemental Affidavit, Ex. 16, ¶4.g.). The entire project took nineteen months, no longer than originally planned. Nothing in the documents sustains any inference -- much less a reasonable inference -- that Mr. Kaiser improperly delayed the project. That there were budget adjustments to insure the project could be paid for (Ex. 15, Ptffs. Ex. 22) does not mean that Mr. Kaiser participated in tortious conduct of the corporation.

Respondent acknowledges that Mr. Kaiser's authorization of funds to purchase properties does not constitute participation in a tort (Respondent's Brief at 68), but argues

[8] Respondent mistakenly identifies the relevant exhibits as Ptff. Ex. 15, Exs. 21 and 22.

that it is somehow relevant to his "knowledge" of the impact of lead pollution on nearby properties. Again, any knowledge that Mr. Kaiser may have of environmental conditions in the community do not equate to the knowing and active participation in a corporate tort necessary for individual liability.

Respondent argues it is a "reasonable assumption" that Mr. Kaiser participated in decisions to cancel certain projects of the Herculaneum Smelting Division (Respondent's Brief at 68), but does not identify any evidence supporting this false assumption. The document Respondent relies on (Ex. 15, Ptffs. Ex. 16) is a listing of division level expenditures for the Herculaneum Smelting Division, in which Mr. Kaiser had no involvement. (Kaiser Supp. Aff., ¶ 4.d.). He does not cancel and has never canceled any pollution projects or environmental projects at the smelter division, and has no authority to do so, a fact which Plaintiffs could have known had they taken depositions directed to this issue.

Respondent continues to refer to the company's $11,000 expenditure on a weather tower as evidence of participation in a tort, on the theory that it constituted some sort of tradeoff of one environmental expenditure (plant paving) against another (the weather tower). (Respondent's Brief at 69-70). Respondent asserts that Relators do not "unequivocally deny" Mr. Kaiser's involvement in this decision. In fact, Relator Kaiser has unequivocally denied that his signature on this AFE reflected any environmental decision making on his part. (Ex. 16, ¶ 4.e). Respondent's argument about Ex. 19, involving improvement of the sinter plant baghouse is similarly flawed. That this

"environmental protection" project (See Ex. 19) was funded by delaying property purchases does not support any inference that Mr. Kaiser committed a tort.

Respondent states that Plaintiffs concluded that implementation of a blast furnace air control system on only one of two furnaces was done for financial reasons, but Respondent does not explain how they came to that conclusion, or to the conclusion that Mr. Kaiser made the decision, which he did not. (Ex. 16, ¶ 4.m).

Respondent contends that Mr. Kaiser, by his signature on financial assurance documents in connection with the company's permits for its slag disposal area (Ptff. Exs. 25-26) represented to the state "that Doe Run has sufficient resources to meet environmental goals." (Respondent's Brief at 73). That is simply not what the documents say. As shown (Relators' Brief at 57) the amount of the penal sum in these documents is not based on the resources necessary "to meet environmental goals," but on the number of acres covered by the waste disposal areas, with the penal sum fixed by statute at $1,000 per acre. R.S.Mo. § 444.368.2. The chief financial officer, the person whose signature on the document was required by regulation, (110 C.S.R. 45-6.030(2)(c)), had to certify that the operator had real property with an assessed valuation more than three times the penal sum. In doing, Mr. Kaiser did not evidence any "knowledge, involvement and management" of the overall pollution control affairs of the company, contrary to Respondent's assertion.

The other documents referred to by Respondent, including the magazine article shared with the lunch room and his Post-Dispatch interview about the company's finances actually show nothing about his knowledge of or participation in any tort.

Thus, the documents that Respondent contends afforded Plaintiffs a reasonable basis for belief that Mr. Kaiser knew of and participated in a corporate tort simply do not sustain the constructions that Respondent advocates. Plaintiffs did not meet the "second part" of the "second prong" of the Malone test. They had no reasonable basis for belief in their claim against Mr. Kaiser at the time they sued him.

C. Relators Have Shown the Falsity of the Pleaded Facts.

Respondent also claims that, regardless of whether Plaintiffs had a reasonable basis for belief in the validity of their claims against Mr. Kaiser, the pretensive joinder claim fails because Relators have not established the falsity of the facts pleaded. Rather, they assert, those facts are "controverted."

Relators have shown the falsity of Plaintiffs' claims. The Kaiser and Zelms affidavits squarely contradict the allegations of the Third Amended Petition that Mr. Kaiser conspired to violate the environmental laws or knowingly participated in any tort. Mr. Kaiser categorically denied any conspiracy to violate the environmental laws (Ex. 9, Tab J, ¶4.a.and b.) or taking any action to delay or reject implementation of proper pollution control measures (Id., ¶ 4.d.). These are the torts he supposedly committed. In a supplemental affidavit filed after Plaintiffs itemized the information they relied on in deciding to sue him, Mr. Kaiser denied the inferences Plaintiffs draw from the documents. He showed how those documents do not support the inferences Plaintiffs draw (Kaiser Supplemental Affidavit, attached to Ex. 16). Plaintiffs claim they will be able to prove the affidavits false by cross-examination at trial (Respondent's Brief at 85) but the time to test a pretensive joinder claim is when it is made. If Plaintiffs thought

they could elicit contrary admissions from Mr. Kaiser by cross-examination, they could have deposed him. They did not.

Plaintiffs filed no contradictory affidavits. Respondent contends instead that the statements in the Kaiser and Zelms affidavits cannot be taken as true because they are "controverted" by the documents that Plaintiffs refer to as their basis for filing suit. A fact advanced in support of a pretensive joinder motion should not be deemed controverted simply because the plaintiff says it is controverted. If a defendant advances proof by sworn testimony that a particular fact alleged by the plaintiff is false, and the plaintiff chooses not to controvert that fact by affidavit or discovery (as occurred here), the plaintiff should at the least be required to come forward with admissible evidence in some form that actually tends to prove the fact asserted. If a plaintiff could controvert a sworn statement of the falsity of a key fact by the unsworn assertion of a party that the fact is true, no fact could ever be proven false for purposes of pretensive joinder.

In this case, Plaintiffs have come forward with little more than their own unsworn statement that the facts they plead are true. They do point to thirty-two exhibits that supposedly establish the truth of their pleadings. As has been shown in Relators' Brief and above, however, those documents do not tend to prove the facts that Plaintiffs plead.

Respondent claims to find limitations in the language of Mr. Kaiser's affidavit that keep it from being an unequivocal denial of the torts pleaded. For example, Respondent claims that Mr. Kaiser's statement that he made no judgments about <u>particular</u> environmental expenditures does not sufficiently deny involvement in resource allocation decisions that might affect environmental expenditures. (Respondent's Brief at 81). As a

reading of both Kaiser Affidavits shows, however, his role in the budgeting process did not include control over environmental expenditures (Ex. 9, Tab J, ¶4.c). As he said, "I defer to these corporate officers and employees having direct responsibility for Doe Run's environmental function on all decisions about budgeting and determining the level of expenditures to control emissions from the Doe Run Herculaneum Smelter ("Herculaneum Smelter"), about implementing pollution controls at the Herculaneum Smelter, and about taking measures to comply with National Ambient Air Quality standards." (Id., ¶2)(emphasis supplied).

It is hard to imagine a more unequivocal denial of liability for the torts alleged in the Third Amended Petition. This denial shifted to Plaintiffs the duty to controvert it. Plaintiffs attempted to do so by reliance on a handful of documents that do not in fact controvert the Affidavits. Mr. Kaiser's statements are therefore to be deemed established as true for pretensive joinder purposes. Relators have sustained their entire burden under both "parts" of the second prong of the test for pretensive joinder. The facts pleaded are false, and Plaintiffs had the means of knowing they were false at the time they sued.

D. The Dixon Proceedings are Relevant Here.

Respondent suggests that the five year history of the Dixon case, in which this same claim was prosecuted by three of the same plaintiffs, represented by the same counsel, against many of the same defendants, is somehow irrelevant. (Respondent's Supplemental Brief at 85). If a reasonable person were asked whether the history of Plaintiffs' actions -- the filing and prosecution of Dixon in Jefferson County; Plaintiffs' loss there on class certification; their simultaneous dismissal of Dixon and filing of Doyle

in the City; the frustration of their first venue attempt by this Court's Linthicum opinion; and, only then, Plaintiffs' addition of Mr. Kaiser as a defendant as a last effort to save City venue -- bears on the question whether Mr. Kaiser was added to this case solely to create venue, the answer would surely be yes.

The Dixon case afforded the Plaintiffs a five year opportunity for the discovery they now say they never had. Dixon was the source of much of the documentary information that Plaintiffs now say formed the basis for their belief they could sue Mr. Kaiser. The history of Dixon underlies Plaintiffs' entire venue effort here, and says much about the credibility of their late joinder of Mr. Kaiser as a Defendant.

Respondent likewise would have this Court ignore the public policy implications of subjecting a corporation to suit in the City simply because a managerial employee resides there and a plaintiff crafts an untenable and conclusory pleading alleging the employee participated in a corporate tort. Contrary to Respondent's suggestion, the General Assembly has never expressed a policy decision to permit such a result. When the legislature chose to allow a Plaintiff to bring suit wherever a defendant resides by enacting what is now R.S.Mo. § 508.010, it did not intend to allow a plaintiff to fabricate venue by joining a defendant pretensively and solely for that purpose. That is what occurred here.

CONCLUSION

For the reasons stated, a permanent writ of prohibition should issue.

Respectfully submitted,

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I hereby certify that one copy of the foregoing brief in paper form (and, where indicated, one copy of the foregoing brief on disk) have been mailed, United States postage prepaid, on December _____, 2003, to:

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I hereby certify that this brief complies with Supreme Court Rules 55.03 and 84.06(b) is proportionately spaced, using Times New Roman, 13 point type, and contains 7700 words, excluding the cover, certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

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